UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

WAYRON, LLC

and Case 19-CA-32983

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS OF AMERICA, LOCAL 104; THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 160, LOCAL LODGE 1350; AND THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 5

Sara Pring Karpinen, Esq.,
for the General Counsel
Kristen Bremer, Esq.,Tonkon Torp, LLP,
Portland, Oregon, for the Respondent

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge. Pursuant to a notice of hearing in this matter was held before me in Vancouver, Washington on October 25, 26 and 27, 2011. The hearing was closed by order dated November 28, 2011. The initial charge was filed by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, Local 104 (Boilermakers) on March 2, 2011. Thereafter, various amended charges were filed by the Boilermakers on behalf of itself and the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 160, Local Lodge 1350 (Machinists), and the International Union of Painters and Allied Trades, District Council 5 (Painters). Thereafter, on June 23, 2011, the Regional Director for Region 19 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging a violation by Wayron, LLC (Respondent) of Section 8(a)(1), (3) and (5) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint,[1] duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the Acting General Counsel (the General Counsel) and

[1] The Respondent was permitted to amend its answer to the complaint at the hearing.

counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following.

Findings of Fact

I. Jurisdiction

The Respondent is a State of Washington corporation with an office and place of business in Longview, Washington where it is engaged in the fabrication and nonretail sale of metal products. In the course and conduct of its business operations the Respondent annually purchases and receives at its Longview, Washington facility goods valued in excess of $50,000 directly from points outside the State of Washington, and sells and ships from its Longview, Washington facility goods valued in excess of $50,000 directly to points outside the State of Washington. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted, and I find, that the named Unions are, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act,

III Alleged Unfair Labor Practices

A. Issues

The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(a)(1), (3) and (5) of the Act by bad-faith bargaining, refusal to furnish information, withdrawing recognition from certain unions, and discharging employees.

B. Facts

The Respondent, a metal fabrication shop, is owned and operated by Faye Dietz and Jeff Spendlove who purchased the company from its previous owner in 2002. Both were former employees of the predecessor company: Dietz was employed as an engineer and Spendlove was employed as a union painter. Dietz is currently CEO and a 51-percent owner of the Respondent, and continues to perform engineering work; and Spendlove owns the remainder and continues to perform painting work.

The predecessor company was a union shop having three separate labor agreements with the three Unions involved herein, each contract expiring at different times. In order to save time and money the Respondent proposed that one set of negotiations covering all employees in one contract would be a more convenient way to negotiate. The Unions agreed. Both Dietz and Spendlove testified that by creating a "wall to wall" contract they had no intention, nor were there any discussions with the Unions, that the parties intended to merge all the employees into a single bargaining unit. There is no contrary evidence.

The most recent contract extended from the "date of ratification"[2] to September 30, 2010. The recognition/union security clause contained in the contract is, *inter alia*, as follows:

[2] It is unclear whether the ratification took place in 2006 or 2007.

> The company recognizes the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forger and Helpers, Local 104; the International Association of Machinists and Aerospace Workers District Lodge 160, Local Lodge 1350; and the International Union of Painters and Allied Trades District Council Number 5 as the sole bargaining agents for the employees classified herein engaged in the fabrication of iron, steel, metal and other products, the machining, repair of machinery or manufacture of products, the preparation or painting/coating of any product item, or in the maintenance work in or about the Company's plant(s) located in Longview Washington or any work undertaken off-site.
>
> It is agreed that all employees under this agreement shall continue to perform their respective craftwork as described by their previously established craft jurisdiction.
>
> Where specific items to a particular craft may be identified, it may be necessary to negotiate a separate understanding.

The union-security clause of the contract provides that all employees shall make application "to join the Union which represents their trade . . ." The contract provides that each Union may appoint a steward for each shift. There is no restriction in the contract precluding each Union from filing grievances on behalf of the workers it represents. Further, the Respondent agrees to contribute a percentage of gross wages into "the individual Union Pension Trusts."

The contract contains separate articles entitled "Field Work Painters," providing that painters' field work is to be governed in accordance with the current "Master Area Agreement Articles for the painting industry"; "Field Work Boilermakers," providing that the current "Western States Field Agreement Articles shall govern boilermakers. . . "; and "Field Work Machinists," a lengthy article with six sections, *inter alia* providing for overtime and double time compensation, straight time compensation at 115 percent of normal shop rate, travel pay, vehicle pay, and company-provided arrangements for overnight trips. The contract contains an addendum with different pay scales for different crafts.

The Boilermakers, Machinists and Painters each sent separate contract-reopener letters to the Respondent. The Boilermakers' letter requested information limited to employees represented by that particular union. In addition the Boilermakers and Machinists sent separate FMCS forms to the FMCS with the intention of describing the number of "Bargaining Unit Members" as limited to the employees within their particular craft.[3] . Attached to the Machinists' reopener letter is a form submitted to the FMCS specifying that there were 3 "Bargaining Unit Members" and 3 "Total Employees at Affected Location(s)" for which the Machinists Union was bargaining, even though at the time there was a total of some 13 or more working employees covered by the contract. There is no reference in any of the letters that any union is intending to bargain on behalf of employees of any other union. There is no showing that contract ratification voting is conducted among all employees as a single unit; rather, according to Boilermakers' Assistant Business Agent Lance Hickey, the Boilermakers would vote as a separate group and he does not know what would happen if one of the three unions voted the contract down.

With regard to the initial charge in this case, filed by the Boilermakers, Hickey testified the charge was filed only on behalf of the Boilermakers, and that the Painters and Machinists were not included because it was believed "They would file their own [charges] separately."

[3] There is no similar FMCS form in the record from the Painters.

Counsel for the General Counsel stated:

> Our position is it's a joint unit of all the Unions with separate classifications and the Unions separately representing their classifications, but bargaining as a group for one contract.

The parties began negotiations for a successor agreement on September 15, 2010. Dean Nordstrom, a labor consultant, accompanied by Dietz, was the chief spokesman for the Respondent. Lance Hickey, assistant business manager for the Boilermakers, was the chief spokesman for the three Unions; Business Representative Gregory Heidal represented the Machinists; Business Representative Jeff Brooke represented the Painters.

At the September 15, 2010 session the Respondent and Unions exchanged their initial proposed contracts. The Respondent's initial proposed contract, *inter alia*, included a proposed $10-per-hour average cut in pay and/or benefits. The Union's initial proposed contract, inter alia, provided for a $1.25 hourly wage increase. Business Agent Hickey testified that at one point during the session, Dietz, who was discussing difficulties the Respondent was having, stated, "How are we going to pay the employees if there is no work? We can't even pay them with a sandwich, or something thereabouts." [4] Also, according to Hickey, "a couple" of contract items proposed by the Unions were discussed.

On September 20, 2010, prior to the next bargaining session, the parties entered into a written agreement extending the contract beyond its September 30, 2010 expiration date; the agreement provides for a day to day extension of the contract until an agreement is reached and ratified, or until either party served on the other party a 5-day notice to terminate the agreement.

The next bargaining session occurred on October 6, 2010. In addition to the aforementioned participants, Bill McCain, the Boilermakers' chief steward was also present. Neither the Respondent nor the Unions deviated from their initial economic proposals. According to Hickey, the parties "reviewed back and forth the proposal from the Unions, and then also from the company."

The next session occurred on November 4, 2010. In addition to the aforementioned participants, Jeff Spendlove was also present. This is the first negotiating session Spendlove attended. At this session Spendlove set out the Respondent's rationale for its revised requested contract concessions, namely a $6.51-per-hour average decrease in wages and/or benefits. Spendlove presented the Unions with a chart which, according to Hickey, "showed the hourly rate, full package, and then where they needed to be at to stay competitive." Thus the Respondent had moved from its initial September 15 proposal of a $10-per-hour average cut in pay and/or benefits, to the $6.51-figure. This would reduce the total compensation package from the current contract compensation package averaging $30.51-per-employee per hour, to a proposed compensation package averaging $24-per-employee per hour; under the Respondent's proposal, the Unions could take cost-cutting reductions from any cost items the employees chose. The extent of Hickey's testimony regarding this presentation by Spendlove, is as follows:

[4] I do not credit Hickey's version of this alleged statement, upon which the General Counsel relies in support of the argument that the Respondent was pleading an inability to pay. Rather, I credit the version given by Business Representative Agent Heidal, *infra*.

> Basically we sat down and started with [Spendlove] reviewing the company's position, talking about how much they needed to make for—to be competitive. I think $4.5 million. They were at 2.5, so they were 2 million short. There was talk about they were basically working on a line of credit. They were going to have to go see the bank in February. If they couldn't get cuts that they needed that they didn't think they could secure a new loan at that time to continue business.

Painters' business representative Jeff Brooke testified that proposals were exchanged at the September 15, 2010 session, and that Nordstrom discussed the "financial hardship" the company was having. Brooke testified the Respondent's proposal was discussed at the October 6, 2010 negotiating session. At the November 4, 2010 meeting, according to Brooke, Spendlove said that "the company had an amount of money and however it wanted to be broken up from labor's side, this is all they could afford to pay for his employees." At this session, according to Brooke, Spendlove "presented the six dollar and change rollback that he would need to keep the company afloat." According to Brooke, Spendlove said if the company was not able to achieve that $24-per-hour number "they would have to close the doors."

Machinists' Business representative Gregory Heidal was designated as the Unions' "scribe" to memorialize the meetings he attended. Heidal testified that Dietz spoke up "a little bit" at the meetings but for the most part was "pretty quiet." At the September 15, 2010 meeting the parties began to question each other concerning the respective proposals they had exchanged. Nordstrom talked about "the hopper and bucket of money" that was available for the employees, but did not seem to be well acquainted with the Respondents' specific proposals. Heidal does not recall if the Unions asked Nordstrom if he had the authority to agree to contract changes. Dietz, according to Heidal, essentially was claiming that there was no work out there, and stated, "If I was just paying a sandwich and there was no work, I could not even pay a sandwich." [5]

Regarding the November 4, 2010 session, Heidal, when asked by the General Counsel whether he remembered "generally" what Spendlove said at that session, answered, "Yeah, as a matter of fact. Not general, I remember pretty detailed what he said."[6] Heidal then went on to recount Spendlove's presentation:

> You know, he came in and pretty much laid of what he felt the condition of the company was, and that really backing up some of what Faye [Dietz] had said before, that they were having a hard time, having difficulties. There's not a lot of work out there, getting some bids. And the company was having good years and having bad years. And that they were looking for a competitive edge or an even playing field, if you will, with his competitors, and that he needed to reduce the costs of the contract.

Spendlove then presented the Unions with a little spreadsheet or matrix, and said the Respondent was "looking at a reduction of something like six-something an hour."

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[5] The rather obvious meaning of Dietz's remark, given the context, is that no matter what the contract wages and benefits, even if the contract provided that the employees should be paid a sandwich rather than $30.51 cents per hour, the employees would be receiving nothing, not even a sandwich, if there was no employment for them.

[6] Heidal appeared to have a relatively thorough recollection of Spendlove's remarks at the November 4, 2010 meeting, reinforced by the notes he had taken. I credit his testimony unless otherwise noted. I do not credit the testimony of business agents Hickey and Brooke to the extent their testimony differs from Heidal's account of meeting.

Asked about whether Spendlove explained what he meant about a February deadline with the bank and the landlord, Heidal testified:

> Yeah, but not in as much detail as I would like. Essentially. . . they had to come to an agreement with the bank and the landlord,[7] and they were looking for us, giving us the impression that it was important for us to get on board for them to make some sort of agreement so that they could go to the bank and say, hey, this is where we're at.

Regarding this, Heidal testified, "I believe Jeff [Spendlove] said they were going to be in financial trouble"[8] if they were unable to make some agreement with the bank.[9]

Heidal testified the Unions asked to look at the Respondents books, *infra*, based on what the Respondent was telling them about its predicament. Asked why the Unions made this request, Heidal testified:

> . . . they weren't crying poverty. In fact, in our first meeting with the company we asked them about that. They were telling us, you know, things were tough. And so we asked them if they were crying poverty. And Dean Nordstrom, I believe, as he said, "you will never –you will never hear us say we don't have the ability to pay. Okay."
>
> Well, as we continued down this road they continue to beat the same drum that they were not making any money. So at some point you got to go, well, okay, prove it, you know. At this point they're not saying—they're not crying poverty, but they're telling us they can't afford the contract. They can't compete with that contract. I don't believe they ever said they can't afford the contract.
>
> So, all right, if that's the case, you're telling you can't compete, then we'll request the financial records. Where are you at? Are you going broke or not?. . . they said they were unable to compete and they wouldn't have any work.[10]

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[7] I find that Spendlove said that in fact they had already made arrangements with the landlord to reduce the rent.

[8] This is different than what Hickey understood, namely that they needed a new loan to "continue in business."

[9] There is no evidence that during negotiations anyone questioned Spendlove about his statements regarding the line of credit or about the annual gross volume of business the Respondent needed to break even, or about the significance of these matters in relation to Spendlove's attempt to convince the Unions of the Respondent's inability to compete under the wages and benefits of the current contract. Indeed, at the hearing, neither the General Counsel nor the Respondent's counsel asked either Spendlove or Dietz to explain the significance or interrelationship of these concerns with the Respondent's repeated assertions of inability to compete.

[10] This final statement was in response to a leading question from the General Counsel, "And weren't they also saying they would go out of business if they didn't get the cuts that they sought?" To this question Heidal testified, "Yes, they said they were unable to compete and they wouldn't have any work." Accordingly, I find that Heidal did not testify that either Dietz or Spendlove said that the Respondent would go out of business if they did not get the cuts they were requesting. Rather, this was Heidal's assumption.

Spendlove testified that the Respondent had approached the Unions in 2009,the year before the expiration of the contract, with this very same problem. The Respondent had wanted to open up certain areas of the contract for concessions to get the costs down. The Unions were not interested, and refused to reopen the contract for this purpose. Without concessions the Respondent was unable to win bids and secure sufficient work for its employees, and layoffs necessarily followed.

Spendlove testified regarding his presentation at the November 4, 2010 meeting. He presented the issues that the company was facing with "securing jobs, future jobs, that is, work for employees." The Respondent had been struggling for some time with securing work, and was not being competitive. It was bidding but losing a significant number of bids, "significantly more than in the past." Spendlove told the Unions that what the Respondent was proposing would not get the company completely competitive but would get them closer, and he handed out the matrix of costs. The current average was $30.51 per hour. This, according to Spendlove, was an average of wages and benefits based on simple arithmetic; some wages, and apparently benefits, were higher for certain employees, and some were lower.

Spendlove testified he did not convey to the Unions that the Respondent was either unable to pay current contract benefits to the employees who were working or even unable to pay current employees more money. Rather, he testified the Respondent could pay the wages and benefits for the employees who were working. There was never a time when the company could not make payroll and benefits. Spendlove tried to convey to the Unions that "Wayron as a company wasn't in jeopardy. . . [but] that what we were not going to be able to provide was jobs." He said this several times. He said that so long as he could be competitive he could provide jobs. Spendlove stated the reduction was necessary so that the Respondent could compete with the nonunion competitors in the area, and conveyed to the Unions that the Respondent needed the cost reductions "in a short term fashion" due to the need to acquire a new line of credit. Further, Spendlove made it clear to Hickey that the Respondent was seeking a contract that could be signed no later than February 2011. Hickey said the Unions would have to talk about it, as $6.51 was a pretty drastic cut, and that the Unions would get back to the Respondent.

Spendlove testified that from the tenor of the discussions at that meeting it seemed to him the Unions understood the situation and were receptive; they said they could appreciate his position. He requested an opportunity to talk with the employees the following day, November 5, 2010, to explain to them what he had told the Unions, because it was a very significant reduction that they were being asked to accept and he wanted the employees to understand why such a significant reduction in wages and/or benefits was essential. He invited the union business representatives to attend. The Unions had no objections to the holding of such a meeting, and Hickey indicated he would be attending. Spendlove left the meeting "with a very good feeling," and was optimistic over the prospects of reaching agreement.

The following day, November 5, 2010, Spendlove held the aforementioned meeting with the employees at the Respondent's shop. Hickey had notified Spendlove that he was unable to attend, and no union representatives were present for the meeting. At the meeting Spendlove told the employees what he had proposed to the Unions during negotiations: that he needed the employees to take a large cut in pay and/or benefits of over $6 per hour, that he had given the Unions and the employees the option of deciding where they would be willing to take the cuts, and that the cuts were needed in order to permit the Respondent to be competitive with the nonunion shops in town. He told them that Wayron had to pull "X" number of dollars per year to

cover overhead. It was not that they couldn't pay, it was that the Respondent could not be competitive, and he was worried about providing jobs.[11]

During the hearing Spendlove and Dietz attempted to explain Spendlove's November 4 and 5, 2010 statements to the Unions and employees regarding the Respondent's need for $4.5 million per year to cover "overhead." Dietz testified that under the then-current contract (apparently assuming a full complement of approximately some 13 employees) the break-even point was $4.5 million. The "overhead" amount was based on all fixed costs, including labor costs, and the Respondent wanted to bring this down. With the reduced $24-per-hour wage and benefits package, the Respondent would no longer need to do $4.5 million per year with a full complement of employees to break even; rather, it could break even with much less gross revenue. Accordingly, regarding the bank line of credit, it appears that the Respondent would not have to ask the bank to continue the line of credit based on $4.5 million gross revenue (that is, the current contract rates), but on a much lesser amount, thus being able to request and obtain a substantially reduced line of credit.[12]

On November 9, 2010, Hickey wrote to the Respondent as follows:

> ***Re: Information Request***
>
> Boilermakers Local 104, on behalf of the Unions (sic) Bargaining Committee, is requesting the following information as a result of the position the Company has taken during contract negotiations. Specifically the Companies (sic) position that it is financially unable to pay wages and benefits equal to the wages and benefits in the expired Collective Bargaining Agreement and the Companies (sic) position during the Bargaining process that it needs wage and benefit concessions to remain in business.
>
> 1. Access to all financial records by an Auditor selected by the affected Unions and any other records deemed necessary by said Auditor to substantiate the Companies (sic) position of inability to pay.
>
> Please give me your response to this request no later than November 30, 2010.

Spendlove replied immediately on the following day, November 10, 2010, as follows:

> 1. Wayron is not, nor has it previously, claimed the inability to pay wages and benefits under any Collective Bargaining Agreement. During the course of our negotiations Mister Nordstrom has, for the record, stated several times that there is no inability to any contractual obligations.
>
>   Wayron's position is that it is unable to remain competitive in the current global economic climate, and is seeking methods of reducing costs to continue to secure work.
>
> 2. For the reasons stated above, Wayron has no intention of allowing access for any audits concerning this matter.

[11] I do not credit the testimony of any employees who testified to the contrary.
[12] As noted, no one questioned Spendlove or Dietz about these matters during negotiations.

Hickey did not directly disagree with this response from Spendlove. Thus, Hickey was asked by the General Counsel whether he agreed with Spendlove's characterization of the Respondent's position in the aforementioned letter that the Respondent was "merely not competitive" rather than unable to pay. Hickey responded as follows:

> . . . I mean I understand with the economic climate seeking a reduction, but the eliminating all, you know, basically all benefits was something that was out of the norm. We haven't seen it from any other Collective Bargaining Agreement we represent. Like I stated earlier, we've seen some small reductions. I mean, less than a dollar reductions, but something this significant amount, you know, was unheard of. So you know, in his statement claiming the inability to pay was still in question. . . [13]

The next meeting was held on December 20, 2010. Only Nordstrom, Dietz and Hickey were present at this meeting. At this time the Respondent employed only three employees, two boilermaker employees and one other employee, either a painter or machinist.[14] It was a very brief meeting, less than about 10 minutes. Hickey testified he "mentioned" that it would help if the parties extended the contract for 1 year.[15] The parties agreed that the next meeting would not be held until sometime in January 2011 due to the upcoming holidays.

The next meeting was held on January 28, 2011. The Respondent scheduled this meeting with a FMCS mediator. Hickey and the various union business representatives were present, as was Bill McCain, the Boilermakers' chief steward. Nordstrom, Dietz and Spendlove were present for the Respondent. The parties did not meet face to face. The mediator shuttled several times from one group to the other. Hickey understood from the mediator that the Respondent continued to propose the reduction to a $24-per-hour wage and benefits package, and the Unions advised the mediator that they refused to reduce the benefits package below the status quo. Hickey testified his "understanding" of what the mediator was telling him was that "without an agreement on the economics from the mediator none of the other parts of the proposal would be discussed."[16] No change in either position was made at this meeting. The mediator indicated that because the parties were so far apart there appeared to be no further need for her services, and no further sessions with the mediator were scheduled.

Immediately following the aforementioned meeting with the mediator the Respondent advised the Unions by email that it was terminating the collective-bargaining agreement on February 4, 2011. On February 2, 2011, Hickey sent a counterproposal to the Respondent

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[13] It appears that Hickey was not stating that the Respondent had professed an inability to pay, but rather was articulating his belief that a request for such steep reductions in wages and benefits was, on its face, tantamount to an inability to pay, and that whether or not Spendlove was "claiming an inability to pay was still in question." Apparently the letter clarified this for Hickey, as no further requests for financial information were forthcoming from the Unions.

[14] Although the record is unclear, it appears that at one point there were some 20 employees working for the Respondent among the three crafts, the great majority of whom were boilermaker employees. Because of a lack of work these employees had been laid off, some for very long periods of time, and by December 2010, the employee complement had declined to three employees.

[15] Hickey testified he believes he "proposed" this, but he did not necessarily want it to be characterized as a formal, written "proposal."

[16] This hearsay testimony was objected to by Respondent's counsel and was received as hearsay not for the truth of the matter but only to permit Hickey to present his understanding of what he understood the mediator to be saying.

providing for, inter *alia*, a 75-cent-per hour wage increase for each classification for each year of the agreement. This was a reduction from the Unions' initial proposal of a $1.25-per-hour wage increase for each classification for each year of the contract, but an increase from its recent December 20, 2010 and January 28, 2011 verbal proposal to retain the status quo.

Another negotiating session was scheduled for February 4, 2011. On the morning of the scheduled date Hickey emailed Spendlove as follows:

> I just got off the phone with Dean Nordstrom, he feels that the Company is not willing to move from your original proposal back in November he believes today meeting would be unproductive. Just to confirm with you is that indeed the position of the Company is that their last offer is the last best and final offer, if that is the case we agree nothing productive will result from meeting today, however if you are willing to continue to bargain and propose changes to the Company's position we are still willing to meet today. We have the Woodworkers hall reserved for 2:30pm today. (Syntax in original.)

Spendlove replied by email, "We will see you at 2:30"

The parties met again that afternoon. The same participants were present. The Union's February 2, 2011 proposal was reviewed. There is no contention that the Respondent refused to discuss anything the Unions wanted to discuss. Hickey believes the Unions retracted their February 2, 2011 proposal, requesting a 75-cent-per hour wage increase, by stating they were willing to forego any wage increase and simply retain the status quo in a new contract as they had proposed at the earlier sessions. The Respondent declined, and again reiterated its need for the $24-figure because of the average benefits package of their competitors in the area [17] and, in addition, to show this reduction to its bank in order to get an extension of the line of credit. The Respondent said it would be implementing new terms and conditions of employment on Monday. Hickey's computer notes of the meeting state that as of today the company has not shown any movement from its November 4, 2010 proposal, and "the company would be looking at the terms and conditions for the employees this weekend and will be implementing those terms and conditions on Monday."[18]

Spendlove testified that throughout negotiations the Unions did not attempt to negotiate contract language with him. Further, Spendlove testified that on several occasions Hickey told him that while the Unions were sympathetic to his position, they just felt that giving Wayron concessions was going to lead to a domino effect down the line for all the Unions nationwide, and they could not do this.

On Friday afternoon, February 4, 2011, according to Mike Olson, a boilermaker working foreman, he and the other two employees who were working at the time went into the office to punch out. They were told by Dietz and Spendlove that "We want you to, on your way out, grab an application. Don't come in Monday, and go ahead and show up Tuesday with the application. We're going to rehire everybody. We're going to start new again." They said the negotiations were terminated because "there was nothing going on," and that the Unions were "not just being real." According to Olson, they did not specifically say the Respondent was going nonunion; however, because he was required to fill out a new employment application, he was uncertain whether the Respondent was still a union shop or not.

[17] Hickey testified he took Spendlove's word for this and did not question it or ask for verification because in some cases he knew it was true.

[18] After the February 4, 2011 meeting, Nordstrom had no further involvement in this matter.

On Monday, February 7, 2011, without prior notification to the Unions, the Respondent sent the following termination of employment letter to all of its employees, including employees on layoff status:

> RE: Termination of Employment
>
> As the Collective Bargaining Agreement, as well as all extensions has (sic) been terminated, your employment with Wayron, LLC is hereby terminated effective 7:00 a.m. Monday February 7, 2011.
>
> All rights and privileges as an employee has ended as a result of this termination as of February 7, 2011.
>
> Your final pay and allowances (if any) will be mailed to you at the above address on the next regularly scheduled pay date, less standard deductions and any amount owed to Wayron, LLC.
>
> You are welcome to apply in person after February 8, 2011 if you wish to seek re-employment.

Spendlove testified the employees were told not to come to work on Monday because he and Dietz did not know at the time whether they could formulate the details of the economic package by then. Thus, in the absence of any guidance from the Unions, they had to decide on the wage/benefit package generally for all employees, and specifically for each employee, depending upon the employee's job classification, seniority and benefits. Spendlove testified that when he and Dietz purchased the company from its predecessor, they terminated and rehired all of the employees; similarly, they thought this would be a good precedent to follow in order to make a clean break for accounting purposes[19] and start over. He testified, "It seemed to us that the cleanest, best way to…enact the last offer before reaching impasse, the cleanest, easiest way to do that and keep everything clear would be to just start everybody over on a completely new set of…bookkeeping books." They had the employees reapply because they were not sure that employees would want to come back under the new conditions. As noted, there were only three employees working and many more on layoff status. Spendlove testified it just seemed like the most direct way to let the employees know that they would be returning to work under new terms and conditions of employment, and for the employees to let the Respondent know that they were willing to do so.

Over the weekend the Respondent had decided upon a new wage and benefits package that would conform to its last and final wage and benefits proposal it had offered to the Unions, namely, an average $24-per-hour figure per employee. On Tuesday, February 8, 2011 the employees who were working on the previous Friday were rehired after filling out new employment applications, and began receiving wages and benefits in accordance with the Respondent's newly instituted wage and benefits package.

[19] Employees whether or not they were on layoff were entitled to accrued vacation pay, and they were each sent a check for this, as the Respondent did not know whether they would be returning to work or would be remaining on layoff status. If they wanted to be rehired by the Respondent their vacation leave would again begin accruing at the time they were rehired. However, they lost no vacation benefits.

Robert Stone, a Boilermaker employee, who apparently was on layoff status, testified that he phoned Boilermaker Foreman Gary Bishop about the letter. Bishop told him to come in and reapply. He did not reapply because "Well, they fired me once, so I figured they didn't want me."

Bill McCain, a 20-year Boilermaker employee with the Respondent and its predecessor, had been shop steward for the Boilermakers and had attended negotiating sessions. He had been on layoff status since December 15, 2010. Sometime after February 7, 2011 he received the aforementioned letter from the Respondent. McCain testified that on Friday, February 4,2011 he had a phone conversation with Mike Olson, a Boilermakers foreman, whom McCain identified as a lead man, and asked him about the situation. Olson told him to come in and fill out an application, adding that he too had been given an application on Friday. Olson told him that they were "closing on Monday and reopening on Tuesday, the following day, non-union, that I had to re-apply for my job." Olson did not say where he had obtained this information. McCain testified that upon reading the letter he assumed the Respondent was going to be a nonunion shop as the letter said nothing to the contrary. He never spoke to Dietz or Spendlove about the matter, and did not reapply because he did not want to work for a non-union shop; nor would he have reapplied even if he knew the shop would continue to be a union shop but not under a collective-bargaining agreement.[20]

Corey Wasson, a boilermaker employee, is currently employed by the Respondent. Wasson reapplied for his job after receiving the letter and spoke with Dietz and Spendlove. Wasson testified that when he met with Dietz and Spendlove, he believes they told him the shop would be working "not under a Union contract anymore, and they decided to pay him more money in wages but there would not be more benefits till later on when the company was dong better." However his Board affidavit states that when he went in to meet with Dietz and Spendlove, "The first thing they told me was the shop was non-Union and . . . there would be no benefits." Wasson attempted to explain this discrepancy by testifying, in effect, that his affidavit was imprecise as it reflected his belief or understanding of the situation rather than the explicit words of Dietz and Spendlove.

Wasson attended a Boilermakers union meeting held for the purpose of updating employees about the status of negotiations. Wasson testified that one of the business representatives stated there should be some work coming up at the shipyards and that the employees would not be able to return to Wayron without a contract and work in the same trade because it was against the Boilermakers constitution; thus, the employees could not be in the Union if they continued working for Wayron.

Brett Lafever, a boilermaker employee, had worked for the Respondent since 2007. He reapplied on February 8, 2010 and was rehired. His Board affidavit states: "The interview started with Jeff and Faye thanking me for coming in and telling me that as I may know Wayron was starting up as a non-Union shop." However during the course of his testimony he too attempted to retract this statement by maintaining that this was more of an assumption on his

[20] The Respondent, in its answer to the complaint, admits the supervisory status of Mile Olson. At the hearing however, Respondent's counsel stated this was an error on her part and was granted permission to amend the answer to deny supervisory status. Thereupon the General Counsel was given time to investigate and provide further evidence on this matter. While it appears from the record evidence that Olson was not a supervisor within the meaning of the Act, it is unnecessary to make such a determination. Thus, the statement regarding the nonunion status of the Respondent attributed to Olson by McCain is identical to the statements I find were made by Dietz and Spendlove, *infra,* and would simply be cumulative.

part rather than the actual statements of Dietz and Spendlove. He further testified that neither Dietz nor Spendlove said anything at all about the contract or the Unions, and did not say the company was no longer under a union contract. During the interview they told him about a new package deal for each employee; he was offered more wages, but no pension and no medical, and told that maybe these benefits could be available in the future.

On February 18, 2011, and again on February 22, 2011, Hickey wrote to the Respondent to schedule further negotiations. On March 2, 2011, the Boilermakers filed its initial charge in this matter, and filed amended charges on March 9 and 18 alleging, *inter alia*, that the Respondent had withdrawn recognition from the Boilermakers. [21]

Spendlove did not reply to the requests for further negotiations until March 14, 2011 when he sent the following email to the Unions:

> Wayron is, and has always been, willing to meet with you for contract negotiations. However, what appears to be more pressing is the Boilermaker's NLRB charges against the company, which Wayron denies. We anticipate that the subject matters of the charges may overlap with any topics of negotiation and further anticipate that the parties will not be able to bargain beyond impasse without the resolution of such charges. Wayron hopes that negotiations will be productive in resolving the charges and moving forward with a new contract.
>
> We have negotiated in good faith with the union and will continue to do so.

There were further emails back and forth as to which side had the primary responsibility to furnish tentative negotiating dates. By email dated March 24, 2011 Spendlove proposed negotiating dates to Hickey and also stated:

> I recommend that one of the first orders of discussion is dismantling the wall-to-wall contracts with the three unions. While this may have been effective and efficient several years ago, the nature of our business has changed, and based on unforeseen economic factors, the Company intends to negotiate that it separately bargains with each union.

The parties agreed to meet on April 22 and 29, 2011. However, on April 19, 2011, the Boilermaker employees filed a decertification petition in a unit described as excluding "Painters, Machinists, Office Personnel." Spendlove testified that upon being advised of this decertification petition he believed the Boilermakers Union no longer had the majority support of the boilermaker employees. He based this belief on the fact that he was told this by the two boilermaker employees who filed the petition, namely, Brett Lafever and Rick Crenshaw, "that eight people, I believe it was eight people, had signed the petition." At that time, according to Spendlove, the Respondent had eight boilermaker employees "on its books," four who were working and four who were apparently on layoff status. [22]

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[21] On April 4, 2011, the Boilermakers filed its third amended charge in this matter, for the first time specifying that it was filing on behalf of itself and the two other Unions "as joint representatives of the bargaining unit."

[22] Two boilermaker employees were hired on February 8, 2011, two were hired on February 9, 2011, two were hired on April 25, 2011, one was hired on April 27, 2011 and one was hired on May 23, 2011. The two employees who filed the petition were Brett Lafever, who had been hired on February 9, 2011 and Rick Crenshaw, who was not hired until May 23, 2011.

By email dated April 21,2011, Spendlove stated to Hickey:

> In light of the petition Wayron received on April 19, 2011 regarding Boilermaker decertification, Wayron is canceling the negotiation meeting scheduled for the 22nd of April.
>
> At this time we plan to continue to negotiate with the Machinist and Painter unions as scheduled on the 29th, but will confirm this prior to meeting next week.

The scheduled April 29, 2011 meeting with the Painters and Machinists was not held because these Unions refused to meet without the Boilermakers also being present; the Respondent was not agreeable to this condition.

On May 6, 2011 the machinist employees filed a decertification petition in a unit described as excluding "Painters, Boilermakers." As of that date the Respondent had only one machinist employee on its books. Spendlove advised the Machinists Union that the Respondent was "withdrawing recognition" from that Union. Spendlove testified the Respondent felt it would be improper and unlawful "if we bargained with two decertified Unions."

By May 23, 2011 all eight boilermaker employees were working.

By emails dated June 14 and July 8, 2011 the Boilermakers requested "hire or re-hire dates" for eight named employees who had returned to work; they had all been working since May 23, 2011. Spendlove initially did not provide the requested information because of the pending boilermakers employees' decertification petition.

On June 23, 2011 the complaint in this matter was issued. Further, sometime before July 27, 2011 the Regional Office dismissed both decertification petitions.[23]

As a result of this development, Spendlove replied to the Boilermakers by email dated July 27, 2011, giving the hire or rehire dates of the eight employees "out of an abundance of caution," but further stated that the Boilermakers no longer had majority support from the individuals in that unit, that the employees "had made it known to the NLRB and the company that they do not want to be represented by the Boilermakers," and that, "Out of respect for the employees' expressed intent, the company does not recognize the Boilermakers and is under no obligation to provide the requested information." Thus, the Respondent had delayed providing the information from June 14, 2011 to July 27, 2011.

Thereafter the Respondent was advised by the Regional Office that the Board had authorized the filing of an injunction under Section 10(j) of the Act with the Federal district court to require the Respondent to continue bargaining with the Unions as the "joint" bargaining representatives of the unit employees, and to offer four previously laid-off employees, who had been terminated pursuant to Respondent's aforementioned February 7 termination letter, reinstatement to their layoff status.[24]

On August 25, the Respondent emailed all three Unions stating that that it would agree to bargain with the Unions.

[23] The record does not indicate the rationale of the Regional Office for dismissing the petitions.
[24] The employees are Karl Graichen, William McCain, Chester Scott, and Robert Stone.

On August, 26, 2011, the Respondent and Regional Office entered into an Agreement to Entry of a Consent Judgment whereby the Respondent agreed, *inter alia*, to bargain with the Unions, reinstate the named employees to layoff status, and post copies of the Agreement to Entry of a Consent Judgment at its facility.

Thereafter, the parties have negotiated pursuant to the Consent Judgment agreement.

C. Analysis and Conclusions

It is clear that there was no meeting of the minds between the Respondent and the three Unions to engage in collective bargaining for a single/joint wall-to-wall unit covering all employees. Neither the contract itself nor the apparent understanding and conduct of the parties during prior negotiations and the current set of negotiations reflect such a meeting of the minds. Rather, the Respondent and the three Unions were bargaining at the same time not because they had decided to consolidate three distinct craft units into one, but simply for purposes of convenience and cost savings. Indeed, if for some unexplained reason they had decided to establish a single unit,[25] it is reasonable to presume they would have simply said so in no uncertain terms so that there could be no ambiguity; such as, for example, "This contract is intended to cover all employees represented by the individual unions as a single unit and not as three separate units." Here, Spendlove was insistent that there was no such agreement, and not one union witness testified to the contrary. "The Board does not find a merger in the absence of unmistakable evidence that the parties *mutually* agreed to extinguish the separateness of the previously recognized or certified units." *Duval Corp.,* 234 NLRB 160 (1978) (emphasis *in original) (quoting Utility Workers Union of America,* 203 NLRB 230, 239 (1973), enfd. 490 F.2d 1383 (6th Cir. 1974). I shall dismiss this allegation of the complaint

Throughout the course of bargaining both sides essentially adhered to their respective initial positions. The Respondent required significant reductions in labor costs to remain competitive. While not entirely clear from the record, it appears the Respondent's total employee complement had declined from at one point approximately 20 employees, to a relatively steady employee complement of some 13 employees, to 3 employees in late 2010 and early 2011 when the current negotiations were ongoing. Dietz and Spendlove attributed the decline to the fact that the Respondent was unable to successfully bid jobs due to excessive labor costs. Although the Unions acknowledged this as the catalyst for the Respondent's request for concessions, they were nevertheless adamant that there would be no reductions whatsoever; thus, Hickey told the Respondent's negotiators as well as boilermaker employees that to give the Respondent concessions would cause a domino effect with other employers that would adversely impact the Unions, and that there would be no concessions.

It is clear that throughout negotiations the Respondent never explicitly said that it could not or would not agree to the Unions' proposals because of an inability to pay. In fact the opposite is true. Thus, at the very first negotiating session, when the Unions asked whether the Respondent was making such an assertion, the Respondent's negotiator, Nordstrom, immediately replied in explicit terms that it was making no such claim. And in November 2010, when the Unions asked to examine the Respondent's financial records, the Respondent, through Spendlove, again immediately reiterated that it had made and was making no such claim of an inability to pay. It is significant that Hickey did not dispute that the Respondent was

[25] As noted, the record is devoid of evidence that the parties decided to establish a single unit, and there is no record evidence of any benefit whatsoever, either to the Respondent or to the Unions, for consolidating the three units into one for bargaining purposes.

at a competitive disadvantage; indeed, the Unions neither disputed this assertion nor requested information supporting this specific contention of the Respondent, such as, for example, documents showing bids by the Respondent that it had not been awarded. Clearly, the Unions knew why the Respondent's employee complement had drastically declined.

The General Counsel argues that although there was no explicit statement from the Respondent of an inability to pay, such an inability may be gleaned from some of the remarks made during negotiations, namely Dietz's remark that the Respondent could not even pay the employees a sandwich, and Spendlove's remarks about a $4.5 million break even point and the necessity of securing a bank line of credit. I do not agree. I find that these remarks and examples were intended by Dietz and Spendlove to demonstrate and convince the Unions and employees of the necessity of concessions so that the Respondent could successfully return the laid-off employees to work (and earn more than the price of a sandwich, that is, more than nothing) and provide employment for the complement of employees it had employed in the past. To do so would require a new break even point and a continuing line of credit sufficient to conduct its business operations based on a full complement of employees. I shall dismiss this allegation of the complaint. *American Polystyrene Corp.*, 341 NLRB 508 (2004); *AMF Trucking & Warehousing, Inc.*, 342 NLRB 1125 (2004); *North Star Steel Co.,* 347 NLRB1364, 1369-1370 (2006); *Nielsen Lithographing Co., 305 NLRB 697, 700 (1991), affd. sub nom. Graphic Communications Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992).[26]

Both sides began with proposals that they eventually modified. The Respondent lowered its initial demand from an approximately $10-per-hour cut in pay and/or benefits to a $6.51-per-hour cut in pay and/or benefits.[27] The Unions reduced their initial demand from a pay increase to simply an extension of the current contract pay and benefits, the status quo, over a 1-year period. Neither the Respondent nor the Unions were willing to move from their respective positions. Discussions regarding contract language were either nonexistent or highly abbreviated as economics dominated the negotiations; there is no showing that the Respondent was unwilling to discuss whatever the Unions wanted to discuss regarding any of the Respondent's contract proposals, including specific proposed changes in contract language. The fact that many noneconomic proposals had not yet been negotiated was not due to the

[26] Even if the Respondent had explicitly claimed an inability to pay, I find that under the circumstances herein the Unions would not be entitled to the requested financial information. Thus, in *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956) the Supreme Court states, "We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn on its particular facts." Here, regardless of the Respondent's financial circumstances, the Unions made it clear that for reasons unrelated to the Respondent's financial circumstances it could not agree to concessions, particularly to the significant concessions requested by the Respondent, because to do so would jeopardize the Unions' bargaining positions nationwide. Both sides knew, under the circumstances, that an audit of the Respondent's financial documents simply would have been an unproductive, time-consuming, exercise in futility, and would not have advanced the prospects for agreement.

[27] The Respondent advised the Unions that it made no difference what contract cost items were reduced to get from the contract rates, which the Respondent calculated as amounting to a $30-per-hour average cost package, to approximately a $24-per-hour average cost package, a reduction of $6.51 per hour. It furnished the Unions with a chart identifying each of the current economic items-wages, vacation benefits, holiday benefits, health and welfare benefits, pension benefits, funeral benefits and jury duty benefits--and the average hourly amount of each item, and suggested that the Unions survey the employees to determine which of the economic items they would be willing to reduce and the extent of the reductions.

Respondent's refusal to do so. Rather, it is clear the parties implicitly postponed bargaining over non-economic matters until agreement had been reached on the overriding economic issues.

The parties bargained from September 15, 2010 through February 4, 2011, a period of nearly 5-months, and the Respondent was willing to extend the terms and conditions of the expired collective bargaining from September 30, 2010 to February 4, 2011, a period of over 4 months, to facilitate the reaching of an agreement. Finally, as no progress was being made and as time was of the essence, the Respondent, in a final attempt to reach agreement, initiated a meeting with a Federal mediator to assist the parties' efforts. Clearly, the parties, after bargaining, had reached the point at which neither side was willing to move from its firm position. Hickey admitted as much in his February 4, 2011 email, *supra*. Accordingly, an impasse had been reached. I so find. I shall dismiss this allegation of the complaint. See *Californian Pacific Medical Center,* 356 NLRB No. 159, slip op. at 6-7 (May 25, 2011).

The General Counsel maintains that the terms and conditions of employment established and implemented by the Respondent on or after February 7 were unilaterally implemented in violation of Section 8(a)(5) of the Act because they had not been specifically proposed to the Respondent during negotiations.

In support of this argument the General Counsel points out that in fact after February 8, 2011, the Respondent's payroll reflects an average hourly pay/benefits package of its then-current employees of less than $24 per hour, and that this establishes that the implemented economic package was less than, and not reasonably encompassed by, what was offered the Unions during negotiations. I find no merit to this contention. Between February 4 and 8, 2011, the Respondent was attempting to establish an average hourly rate of approximately $24 per hour based on its current and laidoff employee complement at the time; the fact that its employee complement changed after it instituted this pay/benefit package was simply a contingency that it could not have accurately input into its calculations over the weekend of February 4, 2011, as it did not know which employees would be returning to work. Moreover, the fact that the Respondent raised the hourly wage of some of its employees while reducing or eliminating other benefits seems to be consistent with the Respondent's proposal during negotiations.[28] Thus the Respondent's proposal gave the Unions a lump sum, namely $24 per hour, to disburse among various wage and benefit items, in the amounts selected by the Unions; the options presented the Unions did not preclude increasing any benefits the Unions and employees may have chosen to increase, nor did it preclude the elimination of any benefits the Unions and employees may have chosen to eliminate. Accordingly, following the impasse, the Respondent was privileged to unilaterally increase, reduce and/or eliminate any of the various economic items in order to arrive at, or as close to, the $24-per-hour average as possible. I find that the Respondent diligently endeavored to do so.

In summary, the record evidence shows that the Respondent attempted to reduce its wages and benefits by some $6.51 to an average of some $24-per-hour, and that it did so within reasonable bounds considering the difficulty of having so many variables to reconcile in order to reach that figure. Further, I find that the terms and conditions implemented by the Respondent were reasonably encompassed by the proposals it made to the Unions during the course of bargaining. I shall dismiss this allegation of the complaint. [29]

[28] At some point during negotiations the Unions advised the Respondent that the employees had been polled as to what financial items they deemed most significant, and that wages was of primary importance.

[29] The record evidence supports the Respondent's contention that it had always recalled employees from layoff based on both seniority and the employees' specific abilities to perform

As I have found above, after an impasse had been reached the Respondent advised the Unions that it would be implementing new terms of employment on the following Monday, February 7, 2011.

By letter dated February 7, 2011, all of the employees, whether they were currently employed or on layoff status, were discharged as follows:

> As the Collective Bargaining Agreement, as well as all extensions has (sic) been terminated, your employment with Wayron, LLC is hereby terminated effective 7:00 a.m. Monday February 7, 2011.

They were further advised that all their prior rights and privileges as employees had ended; told that they would be mailed their final paychecks; and informed that they could "apply in person" if they wished to seek reemployment. Thus the employees were explicitly told that their discharge and the requirement that they must seek reemployment by submitting new employment applications was precipitated by the Respondent's termination of the collective-bargaining agreement; and they reasonably believed, I find, that the Respondent terminated the agreement, as well as the employees, as a result of the Unions' unwillingness to accede to the Respondent's demands during negotiations. While the Respondent maintains that it did not intend to retaliate against the employees, and that its decision to terminate them and have them reapply was premised on legitimate business considerations, it did not so advise the employees in the letter.

I agree with the General Counsel's assertion that such a message to employees announcing adverse consequences, including termination, resulting from the refusal by their collective bargaining representatives to accept the Respondent's demands, is inherently destructive of employees' Section 7 rights, and on its face constitutes unlawful retaliation against them for their union activity in violation of Section 8(a)(3) and (1) of the Act. I so find. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227-228(1963).

Whatever the Respondent's motivation for sending such a letter, it is clear that the employees understood from the letter that the Respondent was terminating its contractual relationship with the Unions as well as its relationship with the employees, that the two were interrelated, and that by reapplying in person the employees would be acknowledging that they agreed to a new relationship with the Respondent; and, as Respondent had severed its relationship with the employees, it was reasonable for the employees to believe it had similarly severed its relationship with the Unions. This conclusion is enforced by the statements of Dietz and Spendlove who, I find, told employees Wasson and Lafever during their reemployment interviews that Wayron was nonunion.[30] By such conduct I find the Respondent has violated

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the work in question, and it had always hired new employees from responses to newspaper ads or as walk-ins seeking employment. The record does not support the General Counsel's contention herein that the Respondent deviated from this *modus operandi* after February 7, 2011.

[30] In this regard I credit the corroborative statements of Wasson and Lafever, attested to in their Board affidavits, and discount their self-serving testimony that their affidavits were inaccurate because they were substituting their subjective opinions and beliefs for what in fact was actually stated to them by Dietz and Spendlove. Further, I discredit the testimony of Dietz and Spendlove to the extent it is inconsistent with the affidavits of Wasson and Lafever.

Section 8(a)(1) of the Act. See *Eldorado, Inc*., 335 NLRB 952 (2001); *Williams Enterprises*, 301 NLRB 167 (1991).

In addition to failing to notify the Unions regarding the termination of all employees, as announced in its February 7, 2011 letter, the Respondent delayed its response to the Unions' request for bargaining for nearly a month; and not until March 14, 2011, after the charge and amended charges herein had been filed, did it finally reply to the Unions' bargaining requests. By such conduct, I find, the Respondent implicitly withdrew recognition from the Unions from February 7, 2011 until March 14, 2011. By such conduct the Respondent has violated Section 8(a)(5) of the Act as alleged. See *Lou's Produce, Inc*., 308 NLRB 1194, 1196 (1992).

Upon receiving the boilermaker employees' decertification petition the Respondent immediately withdrew recognition from the Boilermaker's Union. Later, upon receiving the machinist employee's decertification petition, the Respondent immediately withdrew recognition from the Machinists Union. I find the Respondent was not privileged to withdraw recognition from these two unions, as the probable effects of its prior unlawful conduct had not been dissipated. Thus, as set forth above, it had terminated its employees, required them to reapply, caused them to reasonably believe they would have to give up union representation to be assured of further employment, and did not timely reply to the Unions' bargaining requests. Such unlawful conduct reasonably would cause employee disaffection from the Unions. Accordingly, by refusing to continue bargaining with the Boilermakers Union and the Painters Union after the decertification petitions had been filed, I find that the Respondent has violated Section 8(a)(5) and (1) of the Act. *Lee Lumber & Building Material Corp.,* 322 NLRB 175, 177 (1996), enfd. 117 F.3d 1454 (D.C.Cir.1997); Ely-*Brown Co.,* 328 NLRB 496, 497 (1999); *Pirelli Cable Corp*., 323 NLRB 1009, 1010 (1997).

Because of the pending boilermaker employees' decertification petition the Respondent initially refused to furnish the information requested by the Boilermakers, namely the hire or rehire dates of the eight named employees. Clearly, as the collective-bargaining representative of the boilermaker employees, the Boilermakers Union is entitled to this relevant information. However, the Respondent did not furnish the information until some 6 weeks later when the decertification was dismissed by the Regional Office. By delaying the furnishing of this information, I find the Respondent has violated Section 8(a)(5) of the Act.

Conclusions of Law and Recommendations

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a) (1) and (5) of the Act as found herein.

The Remedy

Having found the Respondent Wayron, LLC has violated and is violating Section 8(a)(1) and (5) of the Act, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix."

On these findings of fact and conclusions of law and on the entire record, I ssue the

following recommended Order.[31]

ORDER

The Respondent, Wayron, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Terminating employees and requiring them to reapply because of the termination of the contract and impasse in collective bargaining negotiations.

   (b) Advising or causing employees to believe that because of the termination of the contract and impasse in negotiations they are no longer represented by the Unions.

   (c) Failing to notify the Unions of its intent to discharge employees, implicitly withdrawing recognition from the Unions, delaying further bargaining with the Unions, and delaying the furnishing of relevant information to the Boilermaker Union.

   (d) Withdrawing recognition from the Boilermakers Union and Machinists Union pursuant to decertification petitions prior to the remedying of unfair labor practices, which reasonably influenced the filing of such petitions.

   (e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act

   (a) Advise, by letter, all employees employed or on layoff status on February 7, 2011 that their terminations have been rescinded, that they need not reapply for future employment, and that their rights and privileges as an employee with regard to seniority and recall from layoff have been restored.

   (b) Within 14 days after service by the Region, post at its Longview, Washington facility copies of the attached notice marked "Appendix", and mail copies of the notice to employees who were on layoff status on February, 2011."[32] Copies of the notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall

[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[32] If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

remain posted for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Regional Office, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: March 29, 2012.

Gerald A. Wacknov
Gerald A. Wacknov
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT terminate employees and require them to reapply because of the termination of the contract and impasse in collective bargaining negotiations.

WE WILL NOT advise or cause employees to believe that because of the termination of the contract and impasse in negotiations the Unions no longer represent them.

WE WILL NOT fail to notify the Unions of our intent to discharge employees, implicitly withdraw recognition from the Unions, delay further bargaining with the Unions, or delay the providing of relevant information requested by the Boilermakers Union as the collective bargaining representative of boilermaker employees.

WE WILL NOT withdraw recognition from the Boilermakers Union and Machinists Union pursuant to decertification petitions before we have remedied the unfair labor practices which reasonably influenced the filing of such petitions.

WE WILL rescind the February 7, 2011 terminations of all employees. You are hereby advised that your terminations have been rescinded, that you need not reapply for future employment, and that your rights and privileges as an employee with regard to seniority and recall from layoff have been restored.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the foregoing rights guaranteed them by Section 7 of the Act.

WAYRON, LLC

_____

(Employer)

Dated: _____ By: _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be referred to the Board's office, 915 2ND Avenue, Room 2948, Seattle, WA 98174-1078, Phone 206.220.6300.